RE ENG POH HONG; EX P MBf LEASING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NO: D8-29-799-2006]
9 OCTOBER 2007

BANKRUPTCY: *Notice - Setting aside - Grounds for - Res judicata - Whether judgment order from which notice arose not a final judgment for debt due to judgment creditor - Whether notice had expired*

This was an appeal by the judgment debtor ('JD') against the decision of the Senior Assistant Registrar dismissing the JD's application to set aside the bankruptcy notice issued against him, which notice arose from a judgment order of the High Court. The grounds of the appeal were: (i) the judgment obtained should not have been the basis of the application for the bankruptcy notice as this was not a final judgment for a debt due to the judgment creditor ('JC'). The shares could not be transferred as they were shares of a PN4 company and at the material time, trading of shares were suspended and now no longer listed; (ii) the issue of *res judicata* – the JC had earlier filed a bankruptcy notice based on the same judgment that had been dismissed by the Senior Assistant Registrar. The JC appealed to the judge in chambers but withdrew the appeal; and (iii) the bankruptcy notice in any case was served on 18 July 2006, more than three months after it was issued on 17 March 2006, which was contrary to r. 96 of the Bankruptcy Rules 1969.

Held (allowing the appeal):

(1) *Res judicata* was applicable in this case. A hearing of the appeal to a judge in chambers from the decision of the Senior Assistant Registrar was to be treated as a "one piece" hearing and to be heard by way of a rehearing by the judge as if the matter came before him for the first time. *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* (refd). For so long as the hearing of the appeal before the judge in chambers was still pending, the matter could not therefore be construed as having been fully adjudicated upon. Further, the JD should be allowed to succeed in this appeal on the following grounds: (a) the judgment order of the High Court, on the facts, clearly stated that the JC was entitled to the specific performance

compelling the defendant to purchase the plaintiff's shares in one United Chemical Industries Bhd at the price of RM8,852,250. This was not to say that the defendant must pay the plaintiff the sum of RM8,852,250. The order required the defendant to purchase and not to pay a judgment debt. The order was, therefore, not a "final judgment" to enable the JC to apply for a bankruptcy notice under s. 3(1)(i) of the Bankruptcy Act 1967. The appropriate step that the JC should embark upon would be to institute a contempt proceeding against the JD and not to petition for bankruptcy; and (b) it was also clear that the bankruptcy notice had expired when it was served on the JD on 18 July 2006, the extension having been obtained only after it was served. (paras 5 & 6)

Case(s) referred to:
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Bankruptcy Rules 1969, r. 96

For the judgment creditor - Ridzal Dzulkifli; M/s Michael Chai & Co
For the judgment debtor - CW Leong; M/s CW Leong & Assoc

Reported by Suresh Nathan

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: ***(ex-tempore)***

[1] This is an appeal by the judgment debtor against the decision of the senior assistant registrar in dismissing the judgment debtor's application to set aside the bankruptcy notice issued against him.

[2] The notice arose from the judgment order of the High Court which read as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
GUAMAN NO. D3-22-3155-1998

ANTARA

MBf LEASING SDN BHD ... PLAINTIF

DAN

ENG POH HONG @ WONG CHOON MING ... DEFENDAN

PADA 31 HARIBULAN MAC 2004 MAHKAMAH TERBUKA

PENGHAKIMAN

Tindakan ini telah dibicarakan di hadapan Yang Arif Hakim Dato' Zulkefli Ahmad Makinudin pada 11 haribulan September 2002, 2 haribulan Disember 2002, 30 haribulan Oktober 2003 dan 13 haribulan November 2003.

ADALAH DIHAKIMKAN bahawa perjanjian "Put Option Agreement" di antara Plaintif dan Defendan bertarikh 1 haribulan November 1997 di perenggan-perenggan 3 dan 4 Pernyataan Tuntutan Terpinda bertarikh 19 haribulan Jun 2000 dilaksanakan secara spesifik.

DAN JUGA ADALAH DIHAKIMKAN bahawa Defendan membeli 550,000 saham-saham United Chemical Industries Bhd. daripada Plaintif pada harga jualan RM8,852,250.00; dan membayar kepada Plaintif jumlah RM8,852,250.00 bersama dengan segala fee, kos dan bayaran yang berhubung dengan penjualan dan pemindahan milik saham-saham tersebut dalam masa tujuh (7) hari selepas penghakiman ini.

DAN AKHIRNYA ADALAH DIHAKIMKAN bahawa Defendan hendaklah membayar kepada Plaintif kos bagi tuntutan ini.

Bertarikh pada 31 haribulan Mac 2004.

Sgd.

Norliza bt Othman
Timbalan Pendaftar
Mahkamah Tinggi
Kuala Lumpur.

[3] The grounds of the appeal are as follows:

1. The judgment obtained should not have been the basis of the application for the bankruptcy notice as this is not a final judgment for a debt due to the judgment creditor. The shares

cannot be transferred as they were shares of a PN4 company and at the material time trading of shares were suspended and now no longer listed.

2. Issue of *res judicata* – judgment creditor had earlier filed a bankruptcy notice based on the same judgment and had been dismissed by the senior assistant registrar. The judgment creditor appealed to the judge in chambers but withdrew the appeal.

3. The bankruptcy notice in any case was served on 18 July 2006 that is to say more than three months after it was issued on 17 March 2006 – contrary to r. 96 of the Bankruptcy Rules 1969.

[4] Reply by counsel for the judgment creditor: (verbatim)

1. See s. 3(1)(i) of the Bankruptcy Act 1967:

> if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equal or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

Submits the judgment order came within the ambit of "requiring him to pay the judgment debt for sum ordered to be paid in accordance with the terms of the judgment". Here there is an order requiring the judgment debtor to pay the sum of RM8,852,250.

2. We did file an earlier bankruptcy notice. At the hearing of the appeal before Justice Vincent Ng we were asked whether we could file a fresh bankruptcy notice and we said we could. Hence we adhered to his direction but left the appeal where it was. There is no question of *res judicata.*

3. We obtained the extension to serve this notice on 3 October 2006.

Findings And Decision

[5] *Res judicata* is applicable in this case. A hearing of an appeal to a judge in chambers from the decision of the senior assistant registrar is to be treated as a "one piece" hearing and to be heard by way of a rehearing by the judge as if the matter comes before him for the first time. See Supreme Court decision in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 CLJ 716. For so long as the hearing of the appeal before the judge in chambers is still pending the matter cannot therefore be construed as having been fully adjudicated upon.

[6] Nevertheless, the judgment debtor should be allowed to succeed in this appeal on the following grounds:

1. The judgment order clearly states that the judgment creditor is entitled to the specific performance compelling the defendant to purchase the plaintiff's shares in United Chemical Industries Berhad at the price of RM8,852,250. This is not to say that the defendant must pay the plaintiff the sum of RM8,852,250. The order requires the defendant to purchase and not to pay a judgment debt. The order is therefore not a "final judgment" to enable the judgment creditor to apply for a bankruptcy notice under s. 3(1)(i) of the Bankruptcy Act 1967. The appropriate step that the judgment creditor should embark upon is to institute a contempt proceeding against the judgment debtor and not to petition for bankruptcy.

2. It is also clear that the bankruptcy notice had expired when it was served on the judgment debtor on 18 July 2006, the extension having been obtained only after it was served.

[7] Appeal is allowed with costs.